IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-624

UNITED STATES OF AMERICA,
Petitioner,

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

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INDEX.

CITATIONS.

Cases.

Statutes and Regulations.

Miscellaneous.

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INTEREST OF THE *AMICUS CURIAE*.*

The Chamber of Commerce of the United States is a national association of more than 3,600 state and local chambers of commerce and trade associations with an underlying membership of over five million business firms and individuals, in both metropolitan and rural areas.

* Pursuant to Supreme Court Rule 42(1), this brief is filed with the written consents of all parties, which have been lodged with the Clerk of the Court.

Direct business memberships number in excess of 44,000 with activities ranging from raw material extraction to production of finished goods, as well as many types of services.

The Government contends in this case that, notwithstanding the federal water control program developed under the Federal Water Pollution Control Act, Section 13 of the Rivers and Harbors Act of 1899 established an absolute ban on all industrial discharges that would introduce into the receiving waters any chemical, biological or other change whatever, unless a discharge permit is first obtained from the Secretary of the Army. As noted in the opening paragraph of the Argument, *infra*, this sweeping, all-encompassing interpretation of Section 13 would require the Court to find that every agricultural, industrial or other private water user discharging into the nation's waterways has been operating in violation of federal criminal law throughout the 20th century.

Many members of the Chamber have made expenditures of substantial time, technical effort, and financial resources to comply with the nationwide program for water pollution abatement and control developed during the past decade pursuant to the Federal Water Pollution Control Act. That program could be destroyed if the Government's contentions in this case were adopted. In order to present its views on questions of vital public concern of this character and magnitude, the Chamber has participated as *amicus curiae* in a number of instances in both this Court and the lower federal courts, including one of the principal cases relied upon by the Chamber in the case at bar, namely, *The Boys Markets, Inc.* v. *Retail Clerks' Union Local 770*, 398 U. S. 235 (1970).

QUESTION PRESENTED.

Does Section 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. § 407) provide an absolute prohibition against the discharge of all process, cooling or drainage water into navigable waters or tributaries (except that flowing from public streets and sewers), unless a discharge permit is first obtained from the Secretary of the Army?

SUMMARY OF ARGUMENT.

It is the position of *amicus*, Chamber of Commerce of the United States of America, that, for the reasons mentioned below and more fully developed in the Argument following, the discharges of all process, cooling and drainage water into the nation's waterways are regulated under the Federal Water Pollution Control Act, not Section 13 of the 1899 Act, and this construction does not impair the authority of the Secretary of the Army to maintain navigation under the latter Act.

The legislative history of Section 13, which was one section of a compilation of prior statutes adopted to protect the navigational interests of the federal government, supported by its interpretation and administration by the executive branch of the government for 70 years, shows that Section 13 was intended to be a navigation, and not a pollution control, statute.

Moreover, commencing with the adoption of the Federal Water Quality Act of 1965 and the subsequent amendments of the Federal Water Pollution Control Act, Congress

made it clear beyond doubt that discharges relating to the control and abatement of water pollution were to be regulated under those statutes, and not under the Rivers and Harbors Act of 1899. Construing the older navigation law with the later pollution law in this fashion gives the fullest possible effect to the central purposes of both, thereby avoiding the irreconcilable conflict which would result from the Government's suggested construction of the 1899 enactment. (See pages 24 through 30, *infra*.)

Of even greater portent for the future is the fact that the Government's interpretation of the 1899 law would emasculate the massive water control program now being implemented throughout the country, as mandated by Congress in the Federal Water Pollution Control Act Amendments of 1972.

Finally, if the 1899 law and the later control law are not construed together in the foregoing manner, they are so vague, arbitrary and conflicting, as applied, to be a violation of the Fifth Amendment.

It follows, therefore, that in the case at bar, which undeniably involves a discharge of industrial process water, the judgment of the District Court was in error; the order of the Court of Appeals, to the extent that it reversed the judgment of conviction, should be affirmed; and the case should be dismissed.

ARGUMENT.

The Government asserts in its Brief that Section 13 of the Rivers and Harbors Act of 1899 (hereinafter "the 1899 Act") provides an absolute prohibition against industrial discharges, absent a prior permit from the Secretary of the Army, describing it variously as a "flat ban" (p. 16), a declaration of "simple absolutes" (p. 15), and a "general *prohibition*" (p. 27).[1] In this case the "flat ban" is only sought to be invoked against industrial water users, but there is nothing in Section 13 that limits its application to industries. By its terms the section applies to discharges ". . . *from the shore*, wharf, manufacturing establishment, or mill of any kind . . ." (Emphasis added.) The words "industry" or "industrial" appear no place in the section, and the legislative history of the 1899 Act and its statutory antecedents clearly shows that the practices and abuses intended to be proscribed were not limited to the activities of those engaged in industry. Indeed, it would be absurd to determine the lawfulness of a discharge by the vocation of the party making it.

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1. This "no discharge" argument has been used by the Department of Justice in other so-called Refuse Act suits. In a pending case in the Northern District of Indiana, *United States* v. *United States Steel Corporation*, Civil No. 71 H 52, in answering defendant's interrogatories the Government has defined "refuse matter" as including: "all substances and pollutants (including heat or the absence thereof) which when introduced into water or a solution in which water is the solvent, are (1) totally foreign to that water or solution, or (2) increase the amount or concentration of such substances or pollutants (other than water) in that water or solution, or (3) cause a significant ecological disturbance in the receiving water or solution."

I.

SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899 (33 U. S. C. § 407) DOES NOT APPLY TO THE DISCHARGES OF THE RESPONDENT CHALLENGED IN THIS CASE.

The 1899 Act was enacted to protect the navigable capacity of the nation's waterways and not as a pollution control measure in the modern context. It would be ludicrous to attribute to a 19th century Congress, as Mr. Justice Harlan once observed, an intent to establish forthwith "an absolute standard of purity which not only bore no relation to the prevailing practice of sewage disposal at the time, but also is impossible to achieve even under present day technology." *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 506 (1960). We shall not burden the Court by inclusion of quotations from respected scientific experts to support the self-evident fact that the extent and complexity of the ecological problems of the 1970's about which all of us must be concerned were not even suspected in the 1890's and are not fully understood by some even today.

A. Legislative History and Contemporaneous Construction of Section 13 of the 1899 Act When and After It Was Enacted Show It Was Not Intended to Apply to Discharges Having No Effect Upon Navigation.

The 1899 Act was enacted as a compilation of earlier statutes for the protection of the navigability of the nation's rivers, harbors, and other interstate waterways. Its legislative history clearly establishes that the purpose of the Act was the furtherance of navigation and the avoidance of considerable expense then being imposed upon the federal government in dredging the rivers and harbors of the United States which were becoming

obstructed by intentional dumping of garbage, dredgings, and other kinds of solid wastes. Much of this history was set forth in Justice Harlan's dissenting opinion in *United States* v. *Republic Steel Corporation*, 362 U. S. 482, 493 (1960) and was touched upon by Justice Douglas in *United States* v. *Standard Oil Company*, 384 U. S. 224, 230 (1966). A thorough treatment of the legislative history of the relevant acts is found in Comment, *"Discharging of New Wine into Old Wineskins; The Metamorphosis of the Rivers and Harbors Act of 1899,"* 33 U. Pitt. L. Rev., 483, 494-508 (1972).

The series of enactments which resulted in the Rivers and Harbors Act of 1899 were prompted by the decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1 (1888), which held that there is no federal common law protecting the navigability of the nation's waterways.

The first congressional enactment concerning discharges in navigable waters was designed to protect New York Harbor and was adopted in 1886, the relevant section of which appears as a historical note, 33 U. S. C. A. § 441 p. 170 (1970). This statute was superseded by the Act of June 29, 1888, now appearing as Title 33 U. S. C. § 441, which prohibits the discharge into the harbor of New York (and into other harbors later added), of "refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets and sewers, and passing therefrom in liquid state."

Legislation of general application to all of the nation's waters was first enacted in 1890. Section 13 of the 1899 Act (now § 407 of Title 33 U. S. C.) was preceded by § 6 of the Rivers and Harbors Act of September 19, 1890 (26 Stat. 453) and § 6 of the River and Harbors Act of September 18, 1894 (28 Stat. 363). The former provision, some-

times referred to as the "Dolph" bill, enacted in 1890, provided:

> "that it shall not be lawful to cast, throw, empty, or unload . . . from or out of any ship, . . . or . . . manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, sludge, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States *which shall tend to impede or obstruct navigation,* or to deposit or place, or cause, suffer or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, sludge, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters either by ordinary or high tides, or by storms or floods, or otherwise, *whereby navigation shall or may be impeded or obstructed.*" (Emphasis added.) 26 Stat. 453.

It further provided that such discharges might be allowed in places where they did not interfere with navigation.

The purpose of the 1894 Act was to aid in the enforcement of the 1890 statute quoted in part above, by providing for *in rem* actions against vessels discharging in violation of its terms, borrowing from the provisions in the New York Harbor Act of 1888. During debates preceding passage of the 1894 Act, one of the members of the House Rivers and Harbors Committee, who was also the floor manager of the bill, in response to a contention that his committee had no business adding regulatory provisions to an appropriation bill, said the committee's jurisdiction covered protection of navigation channels and protection against shore erosion, and concluded by asserting:

> "and certainly it covers the questions of the filling up of the navigable waters by deposits made in harbors or in rivers, and of the establishment of harbor lines,

matters which relate strictly to the improvement and maintenance of navigation." (Emphasis added.) See 26 Cong. Rec. 4358 (1894).

These precursors of Section 13 of the 1899 Act were compiled and codified by the Secretary of the Army and the Corps of Engineers by direction of Congress in H. Doc. No. 293, 54th Cong., 2d Sess. (Feb. 15, 1897). Section 5 of the draft legislation proposed in that report became Section 13 of the 1899 Act, the section under which the prosecution of PICCO was undertaken. The notable change of the redraft was the deletion of the long lists of substances specified in the 1890 version in favor of the general term "refuse matter of any kind or description". The phrase, "which shall tend to impede or obstruct navigation" which appeared in the 1890 act quoted above was omitted in the first portion of the codification, though navigation and anchorage were repeatedly referred to throughout the new section. For the reasons set forth below, the phrase was either considered unnecessary or was inadvertently omitted, unless it is concluded that the compilers intended to perpetrate a fraud upon the Congress. In the debates before the Senate, Senator Frye, the Chairman of the Senate Rivers and Harbors Committee, offered the bill as an amendment to the annual Rivers and Harbors Appropriation Act. It was suggested that the Clerk dispense with the reading of it because:

> "It was referred to a subcommittee of the Committee on Commerce, and they examined it very carefully and found it to be entirely correct and in accord with the statutes now in existence, only scattered, as I said before, from the beginning of the statutes down through to the end . . ." 32 Cong. Rec. 2296 (1899).

When one of his colleagues asked Senator Frye "whether there is any change made in the existing law by the amendments?", Senator Frye assured his colleagues that no changes were made, and said: "It is a compilation." 32 Cong. Rec. 2296 (1899).

In passing this Act, Congress could only have intended to exercise those powers it deemed itself to possess. In interpreting § 6 of the 1894 Act (which later became the first clause of what is now Section 13) the Attorney General of the United States stated unequivocally that the power of Congress was limited to the protection of navigation. In this opinion, *21 Opinions of the Attorney General 305*, the Attorney General was asked by the Secretary of War whether the War Department was required to act on a request for permission to dump mine tailings into a navigable water when, in the Secretary's opinion, such dumping would not affect navigation but could adversely affect fish, wildlife, and scenery. The Attorney General responded that it was the duty of the Secretary of War to act upon the permit, and when in his opinion navigation would not be adversely affected, the permit was to be granted regardless of other effects, since the latter were not within the power of the Secretary to consider.

An examination of the legislative history and background of the Rivers and Harbors Act of 1899 compels the conclusion that it was limited strictly to the protection of navigation, the works of navigation, and navigable capacity. As stated in *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140, 1145 (N. D. Ala. 1971), *aff'd.* 456 F. 2d 1294 (5th Cir. 1972), *cert. den.*, 41 U. S. L.W. 3442 (Feb. 20, 1973), a civil action by private parties seeking damages and injunctive relief under the 1899 Act for alleged water pollution:

> "This court concludes that the purposes and extent of the Rivers and Harbors Act was to assist the federal government in insuring that our navigable waterways remain free of obstructions and to protect the special interest in freedom from such obstructions of those who use the nation's waterways for purposes of navigation."[2]

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2. In *Guthrie* the plaintiffs-appellants in the courts below filed a petition in this Court for a writ of certiorari (No. 71-1672). Responding to the Court's request to express the Government's

In support of its contention that Section 13 was intended to deal with pollution as well as navigation the Government in reply may allude to statements made by one of the compilers of the 1899 Act, Judge G. W. Koonce. (Lecture by Judge G. W. Koonce, O. C. E., before the Company Officers Class of the Engineer School, Fort Humphreys, Virginia, April 23, 1926, as reported in "Water Pollution Control Legislation—1971 (Oversight of Existing Programs)," Hearings before the H. Comm. on Pub. Works, 92d Cong., 1st Sess., 284 (hereinafter cited as "the Oversight Hearings".) This *amicus* has no disagreement with Judge Koonce's assertion that the Government need not stay its hand until actual injury to navigation has occurred. It is potential as well as past injury to or interference with the navigational interest that is proscribed. But that is a far cry from the present contention that discharges of industrial process and cooling water having no conceivable adverse effect upon navigable capacity were intended to be covered by the Act. Judge Koonce did not suggest that he considered the thousands of such discharges, then going on continuously without any permits, were in violation of the Act.

B. The Express Language of Section 13 and Its Long History of Administration by the Executive Department Demonstrate That It Is a Navigation Statute.

A careful reading of the entire text of Section 13 makes it apparent that all portions of it are directly concerned with navigation, as distinguished from pollution control. The first portion of the section deals with material "other than that flowing from streets and sewers and passing therefrom in a liquid state" discharged directly into any

views about the case, it is interesting to note that the Department of Justice filed a brief earlier this year recommending denial of the writ. The petition was later denied by the Court on February 20, 1973.

navigable water or into any tributary from whence it shall float or be washed into such navigable waters. This clause clearly refers to that type of material which may have an effect on navigation. The second portion which deals with indirect discharges concludes with the words "whereby navigation shall or may be impeded or obstructed". The third portion excepts improvements in navigation from the operation of the section. In the fourth portion, the Corps of Engineers is given authority to grant permits for dumping but only when the Chief of Engineers finds that "anchorage and navigation will not be injured thereby". The only criterion to be applied to the granting of permits for discharges is that the discharge is not to interfere with "anchorage and navigation." The purpose, scope, and structure of this statute are geared to the protection of *navigation* and not to the problem of pollution.[3]

Throughout its history up to the issuance of Executive Order 11574 by the President directing the establishment of the "Refuse Act Permit Program" in December of 1970, Section 13 was not applied by the executive branch to discharges of the type here involved, *i.e.*, industrial process water discharges resulting from the use of water and consequent chemical and other changes effected by that use. The Government concedes that only four permits were ever issued for such discharges, and three of those were a part of the settlement of the litigation in *United States* v. *Republic Steel Corporation*, 362 U. S. 482 (1960).

3. The "semi-colon argument," namely, that *direct* discharges prohibited are not limited to those affecting navigation because the words "whereby navigation shall or may be impeded or obstructed" appear following the references to indirect discharges, would require treatment of the first portion of the section as though it were a separate section, rather than one of four portions of a whole. Moreover, even Professor Rodgers, a leading spokesman for judicial expansion of the section and frequently referred to in the Government's Brief, is candid enough to admit that such a distinction is "scientifically indefensible." Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 779 (1971).

(Government Brief, page 28, footnote 30) It is significant that these permits deal primarily with the allocation of costs of dredging flue dust from a river among the three defendants and the Government, because of their impairment of navigation, and do not purport to prohibit such discharges.

Indeed, the Government admits that the Corps of Engineers in its published regulations and administration of Section 13 treated it as a navigation statute for nearly 70 years. (Government Brief, pp. 11, 29) When the regulations were amended in 1968, they again made clear that the administrative interpretation of the Act was that it did not apply to the discharge of industrial process and cooling water. The new regulations noted that while Section 13 authorizes the Secretary of the Army to issue permits for discharges to navigable waters, and that it had been so used from time to time, "it is considered preferable to act under Section 4 of the Rivers and Harbors Act of 1905 (33 Stat. 1147, 33 U. S. C. § 419)." (33 C. F. R. § 209.200(c)(2)) Thus the 1899 Act was interpreted to provide for the establishment of dumping grounds for solid wastes, making no mention of discharges of industrial process water which was obviously not covered by the "dumping ground" provision.

It was only after the issuance on December 23, 1970 of Executive Order 11574 (35 F. R. 19627), directing the establishment of the "Refuse Act Permit Program", *without any change whatsoever in the statute itself by Congress,* that the Corps dutifully discovered that Section 13 applies to industrial process and cooling water. Robert E. Jordan, III, General Counsel of the Army and Special Assistant to the Secretary of the Army for Civil Functions, in a statement before the Conservation and Natural Resources Subcommittee on Government Operations on September 17, 1970 (1 Environment Reporter, Current Developments, 567) said:

> "Earlier this year, in testimony before the Subcommittee on Energy, Natural Resources and Environment of the Senate Commerce Committee, I announced a policy of the Department of the Army to enforce 33 U. S. C. 407—the so-called Refuse Act—against those discharging into navigable waters, by requiring permits for such activity. I noted then that the Department of the Army's current permit program was an implementation of Section 10 of the Rivers and Harbors Act of 1899 (33 U. S. C. 403) *and that, historically, we have not had a formal permit program implementing Section 13 of the 1899 Act.*" (Emphasis added.)

Further corroboration is provided by the statement of Brig. Gen. Richard H. Groves, Deputy Director of Civil Works, Office of the Chief of Engineers, Department of the Army, on Thursday, June 3, 1971, in the Oversight Hearings at 263-264. He stated:

> "The Refuse Act contained provisions allowing the issuance of permits for the discharge or deposit of refuse matter under conditions prescribed by the Secretary of the Army. *This particular permit authority had never been used, since other sections of the 1899 Act provided adequate authority for controlling activities which might adversely affect navigation and the navigable capacity of our waterways.*" (Emphasis added.)

In other words, prior to December of 1970 there had never been a program applicable to the discharges which are the subject of the appeal now before the Court.

The foregoing interpretation, which is consistent with the complete absence of a permit program for the discharge of process water from industrial outfalls prior and subsequent to the *Republic Steel* case, clearly establishes that the officials charged with the interpretation of the section did not believe that it applied to the discharges which are the subject of this prosecution.

It is established that regulations have the force of law (*Belden* v. *Chase*, 150 U. S. 674, 698 (1893); *Shell Petroleum Co.* v. *Peschken*, 290 F. 2d 685 (3rd Cir. 1961)) and that courts should give great weight to long-standing and consistent formal administrative interpretation by the agency charged with administering legislation (*Udall* v. *Tallman*, 380 U. S. 1, 15 (1965)). Therefore, the administrative interpretation of Section 13 of the 1899 Act, which was never challenged or corrected by Congress, should be considered determinative of its true meaning. It establishes that Section 13 does not apply to discharges of the Respondent involved in this appeal.

Indeed, the fact that there had never been a permit program, formal or otherwise, administered by the Corps of Engineers or the Secretary of the Army seems to have been known to everyone but the Department of Justice, as observed in PICCO's brief opposing the petition for a writ of certiorari. Attempting to explain away Mr. Ruckelshaus' admission that there was no permit program prior to 1971 (see pages 3 and 4 of PICCO's brief in opposition to the petition), as being attributable to unfamiliarity with past practice displays a surprising lack of candor on the part of the Government.[4] The disingenuous suggestion that there had been some kind of informal regulatory permit program during the 70 years following passage of the 1899 Act reappears in the Government's Brief on the merits. (See p. 10)

The inference is that the Corps of Engineers and the Department of the Army and, in later years, the Environmental Protection Agency, were misinformed in concluding that Section 13 was intended to apply only to discharges

4. Mr. Ruckelshaus has distinguished company if he was uninformed on this matter. John R. Quarles, Jr., General Counsel of the EPA, on June 2, 1971, explained *why* there was no such program, saying: "The Refuse Act was enacted in 1899, and was never regarded as applying to water quality discharges until quite recently." (Oversight Hearings, 208)

tending to affect navigation, and, further, that water users should have known of this error and requested permits from the Corps and the Secretary of the Army. In fairness to those officials it should be pointed out that no other agency in the executive branch of the federal government, *including the Department of Justice itself*, appears to have taken any steps to prosecute the thousands of water users who have been violating federal criminal law throughout the 20th century, if the 1899 Act is a pollution control act, as the Department of Justice now contends.

C. The Judicial Construction of Section 13 Confirms This Administrative Interpretation.

1. Decisions of This Court Do Not Support the Government's Present Contention.

The attempt to expand Section 13 into a pollution control statute must rest upon two cases decided by this Court, *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (1960) and *United States* v. *Standard Oil Co.*, 384 U. S. 224 (1966). Those cases neither hold, nor, when fairly read, support the argument that *all* industrial process and cooling water discharges (described as "industrial waste" in the Government's Brief) are unlawful, absent a prior discharge permit. It is a technological impossibility to utilize water for any purpose and return it with precisely the same levels of chemical and other constituents and at precisely the same temperature as the receiving waters into which the discharge flows.[5]

5. As the National Water Commission has observed in the Review Draft of its Report to Congress: "The danger of a no discharge policy lies not merely in its conceptual unsoundness, but in its potential for doing long-term harm to the pollution control effort. Like other oversimplified solutions to complex social problems, the no discharge policy *holds out a promise of clean water it cannot redeem.*" Review Draft of Report of the National Water Commission at p. 4-6 (November 1972.) (Emphasis added.)

It must also be recognized that both *Republic Steel* and *Standard Oil* dealt with discharges made prior to the enactment of the Water Quality Act of 1965, in which Congress established a regulatory program dealing with water pollution control. (See Point II, *infra*) Both cases arose before there had been any suggestion that the 1899 Act might be considered a pollution control measure in a modern context. Furthermore, language in *Standard Oil* seized upon by the Government in this appeal was not known to Congress when the 1965 Act was adopted, because the decision came in the following year.

Republic Steel was a civil action based upon Section 10 of the 1899 Act (33 U. S. C. § 403) which prohibits the creation of obstructions to navigation. Section 13 was involved only to the extent that the defendants contended that even if it were assumed that the suspended solids being discharged constituted an obstruction to navigation, such discharges were legal under Section 13, which excepts discharges "flowing from streets and sewers and passing therefrom in a liquid state." The Court held that the discharges were not within the exception, and in doing so relied on the administrative interpretation requiring removal of solids from a river which, through build-up on the bottom, had obstructed navigation. 362 U. S. 482, 490 (1960). The Court did not consider in that decision whether discharges which did not create an actual obstruction to the navigable capacity of a river were illegal under either Section 10 or Section 13 of the 1899 Act.

The parties in *Republic Steel*, the Government included, thought they were dealing with a statute designed to protect against potential injury to navigable capacity, not a pollution control measure. At pages 16 and 17 of its petition for a writ of certiorari in *Republic Steel* the Government stated:

> "We are not dealing here with a statute aimed at the prevention of *ordinary pollution*, but with prohibi-

> tions against interference with navigation and the policy of Congress, unchanged since 1899, of compelling riparian owners and users of navigable streams to bear the burden of eliminating any injury to *navigable capacity* their use may produce." (Emphasis added.)

At page 34 of its Appellant's Brief the Government informed the Court:

> "The problem of pollution of streams, navigable or non-navigable, has no direct bearing on the present case, which is addressed to the obstruction of *navigable capacity.*" (Emphasis added.)

Further, *Standard Oil* held only that commercially valuable gasoline could constitute "refuse matter" when introduced into a navigable water from whence it could not be recovered. The matter was presented on a stipulation of facts which established that there had been a single accidental discharge of commercially valuable gasoline into the St. Johns River because a shut-off valve at dockside had been left open and that this was the only discharge involved. The case was briefed and argued before the Court on the sole issue of whether the commercially valuable nature of the gasoline made it something other than refuse matter. On the record before the Court, there was no need to consider whether all industrial process and cooling waters flowing into the nation's waterways are prohibited as being "refuse matter" intended to be proscribed by Congress in 1899 and it was not so considered. The Court examined the legislative history of the Act and its statutory antecedents which established that the commercial value of the material discharged had never been taken into account in determining what was to be banned, but, rather, that the substances enumerated in the statute appeared all to be of such nature as would cause an actual obstruction or danger to navigation.

Transformation of Section 13 into a pollution control statute must be based entirely upon usage of the term

"pollution" by the majority in *Standard Oil,* principally the assertion that: "The word 'refuse' includes all foreign substances *and pollutants* apart from those 'flowing from streets and sewers and passing therefrom in a liquid state'." 384 U. S. 224, 230. (Emphasis added.) But the question of whether Section 13 applies to discharges having no effect upon navigation had not been put in issue. Therefore, even if the emphasized words were construed as the Government contends, it is undeniably clear that they are dicta. Moreover, such an expansive interpretation overlooks other assertions in the majority opinion that the presence of gasoline in navigable waters is a menace to navigation. 384 U. S. at 226.

2. Decisions of the Courts Below Are Inconclusive on the Navigation Question.

Two cases in the Second Circuit exemplify the confusion on the issue. *United States* v. *Ballard Oil Co. of Hartford,* 195 F. 2d 369 (2nd Cir. 1952) is cited by the Government in support of the contention that the criminal sanction of Section 13 is not limited to discharges that might impede or obstruct navigation. (Government Brief, p. 16) *Ballard Oil* held that the negligent pumping of 6700 barrels of heavy fuel oil from a tanker into a river violated Section 13. No one would contend that such a discharge, described as "a black tarry looking mass" being "one inch thick on top of the water," would not impede or adversely affect navigation. Moreover, neither the ultimate purpose of the section nor the effect of the discharge upon navigation was in issue. The Court merely said the district court's finding that the discharge affected navigation did not compel the conclusion that the defendant had been convicted of violating the second clause of Section 13 instead of the first. On the other hand, in the later case of *Nicroli* v. *Den Norske Afrika-Og Australielinie, etc.,* 332 F. 2d 651 (2nd Cir. 1964), the defendant argued that Section 13, and a

section of an Act of 1888 concerning New York harbor now in 33 U. S. C. § 441, prevented a shipowner from hosing spilled sugar off the deck of a ship into the harbor. After examining the statutes the Second Circuit concluded at page 655:

> "Though the statutory language is broad, the *purpose* of these statutes is to prevent the discharge of matter *which will clog or obstruct the harbor or other navigable waters.*" (Emphasis added.)

The Government has frequently cited *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (3rd Cir. 1967) in support of its argument. That case also involved a discharge of oil, this time on the shore from which it flowed into the ocean by gravity. The only issue was whether the point of discharge was too remote from the water to support a conviction. The Court's recitation of the agreement of the Government and the defendant, incorporated in a stipulation of the parties to expedite the trial, that the discharge did not impede navigation cannot be treated as an adjudication of that question.

Only in *La Merced*, 84 F. 2d 444 (9th Cir. 1936) could it be said that a Court of Appeals has held that the effect of a discharge upon navigation is irrelevant. However, *La Merced* was an admiralty action against a vessel from which oil was "thrown, discharged and deposited" in a lake while at anchor (84 F. 2d 444), as distinguished from process or drainage water discharges. Moreover, the court did not consider the legislative history of the 1899 Act. Admittedly, commencing with *United States* v. *Interlake Steel Corporation*, 297 F. Supp. 912 (N. D. Ill. 1969) a number of district courts, without full consideration of either the legislative history or purpose of Section 13, or the absence of a viable permit program, and without manifesting full understanding of the purpose of the Federal Water Pollution Control Act, or the impossibility

of complying with the Government's distortion of Section 13, have held in favor of the Government's position.[6]

Arrayed against these cases, however, are numerous decisions involving civil actions for alleged violations of Section 13 in which Courts of Appeals and district courts have held that the purpose of Section 13 was to protect navigation. *United States* v. *Bigan*, 274 F. 2d 729 (3rd Cir. 1960); *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (N. D. Ala. 1971), *aff'd.* 456 F. 2d 1294 (5th Cir. 1972), *cert. denied*, 41 U. S. L. W. 3442 (Feb. 20, 1973); *Chambers-Liberty Counties Navigation District* v. *Parker Brothers & Co.*, 263 F. Supp. 602, 607 (S. D. Tex. 1967).

II.

SECTION 13 OF THE 1899 ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT MUST BE CONSTRUED TOGETHER SO AS TO GIVE THE FULLEST POSSIBLE EFFECT TO THE CENTRAL PURPOSES OF BOTH.

There are some who contend that if Section 13 of the 1899 Act does not apply to industrial process and cooling water, those discharges are, in reality, free of control. This is demonstrably not true. In some instances it stems from misunderstanding the full thrust and reach of the Federal Water Pollution Control Act (33 U. S. C. §§ 1151, *et seq.*, hereinafter "the Control Act") and especially

6. The recent case of *United States* v. *Granite State Packing Co.*, 470 F. 2d 303 (1st Cir. 1972), involved animal wastes that could adversely affect navigation and the defense rejected by the Court was that the discharge went into a municipal sewer system, not directly into the river. This was a fact issue. However, the Court went on to brush aside the defendant's claim that if there were no administrative procedures whereby it could have obtained a permit, the statute is unconstitutional. The decision contains nothing to indicate that the court considered the consequences of treating Section 13 as an absolute prohibition. We have only the Court's ipse dixit that the statute "forbids certain conduct, with exceptions" (whatever they are), and thus the decision has little precedential value.

§ 1160 together with other changes made by the Water Quality Act of 1965, described *infra*. Contrary to the implication in the Government's Brief at pages 10 and 26, the Control Act does not provide for a State-controlled program with little or no federal control over the formulation or enforcement features. The 1965 amendments to the Control Act make this implication totally unwarranted. Section 10 of the Control Act (33 U. S. C. § 1160), as rewritten in the Water Quality Act of 1965, created a comprehensive program for the control of water pollution in the nation's waterways. In general, it provides for establishing water quality standards and implementation plans for the nation's interstate waters. The States, pursuant to the specific directions of Congress, are given the first chance to formulate these standards and plans for implementation (§ 1160(c)(1)), which are then submitted to the Federal Environmental Protection Agency for its approval. If the Administrator of EPA approves them, they become the federal standards for those waterways. If he does not, a Hearing Board is appointed to set the standards. If industrial and other water users subject to the standards and implementation plans do not abide by them, they are subject to enforcement measures, including suits to be brought on behalf of the United States by the Attorney General in the manner and circumstances provided by § 1160(c)(5) and § 1160(g)(1) and (2) of Title 33 U. S. C. A brief history of the Control Act will explain much of the confusion that has arisen concerning its paramount place in water quality control and will make clear the necessity for accommodation with the 1899 Act.[7]

7. The suggestion at page 20 of the Government's Brief that the federal government has no court enforcement power under the Control Act except as to "interstate waters" is misleading. Pollution of all navigable waters is subject to abatement under the conference procedures provided in §§ 1160(d), (e) and (f). If the federal authority is dissatisfied with the abatement program, the

A. History of the Federal Water Pollution Control Act.

The original Control Act (62 Stat. 1155-1161) was enacted in 1948. It was designed primarily to encourage state and local water pollution control, provide for federal cooperation and focus public attention on particular water pollution problems through a process of conferences, but it was not a comprehensive water quality control program.

The Act was amended in 1956 so as to expand greatly the power of the federal government over the pollution of interstate waters, but it still did not assume the all-encompassing scope of the present statute. Section 8 of the 1956 Act (now Title 33 U. S. C. § 1160) provided for the convening of conferences to determine the existence of pollution (§ 1160(d)), notice to state agencies to take the necessary action to abate the pollution (§ 1160(e)), public hearings if the state agency fails to take adequate action to abate the pollution (§ 1160(f)), and, finally, if adequate action has not been taken within the time allowed following the hearing, court action at the request of the Secretary of Health, Education and Welfare,[8] in the case of pollution endangering the health or welfare of any person, the sole qualification being that, if the only persons alleged to be endangered and all the alleged contributors to the pollution are located in one state, the Governor of that state must consent to filing the suit (§ 1160(g)).

In 1961 the Act was amended to cover navigable as well

Attorney General is authorized to bring a suit on behalf of the United States to secure abatement pursuant to § 1160(g). The reference to "interstate waters" applies only to alleged violation of water quality standards established under § 1160(c).

8. Functions under the Control Act were transferred to the Secretary of the Interior, pursuant to Reorganization Plan No. 2 of 1966. (31 F. R. 6857) Later all functions vested in the Secretary or Department of the Interior by the Control Act were transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970. (35 F. R. 15623)

as interstate waters, but the amendments did not materially change the conference, hearing and notice procedures which were provided for in the 1956 amendments.

In 1965, however, the Control Act was transformed from a cumbersome program, geared in substantial degree to state initiation, into a comprehensive federal program of regulation and enforcement. The Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903, changed the first section of the Control Act (now § 1151(a) of Title 33) to provide:

> "The purpose of this act is to enhance the quality and value of our water resources and *to establish a national policy for the prevention, control, and abatement of water pollution.*" (Emphasis added.)

More significantly, the 1965 amendments provided for adoption of federal water quality standards and implementation plans for all interstate waters within the United States. Title 33 U. S. C. § 1160(c)(1) gave initially to the States the opportunity to formulate the standards for the waters within their jurisdictions but stated that, "*If the Secretary* determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter *be the water quality standards applicable to such interstate water or portions thereof.*" (Emphasis added.) If the States failed to formulate standards meeting the federal requirements, the Secretary of Health, Education and Welfare (now the Administrator of the Environmental Protection Agency, see footnote 8, *supra*) was empowered to promulgate such regulations. (§ 1160(c)(2)) The implementation plans adopted pursuant to the 1965 Act consisted of treatment or discharge guidelines, standards and timetables. They were subject to federal enforcement under the Act. (§ 1160 (c)(5))

Thus, in 1965 the Control Act was transformed from a program of grants and encouragement of state efforts to

control water pollution, as it had originally been drawn in 1948, into a detailed and comprehensive system of federal regulation. There was no need at that time for Congress expressly to negate any parallel or conflicting jurisdiction of the Secretary of the Army to regulate pollution under Section 13, because neither the Secretary nor any other federal agency at the time thought that permits were required except under Section 10 of the 1899 Act relating to possible obstructions to navigation. (See Statement of Robert E. Jordan, General Counsel of the Army, *supra*, at page 14.)

If any additional evidence is needed that Congress in 1965 and thereafter intended to regulate discharges having an effect upon water quality in the Control Act, it can be found in the highly significant addition to the water quality standard-setting provision in § 1160(c)(3) by the Water Quality Improvement Act of 1970 (Pub. L. 91-224, 84 Stat. 91):

> "In establishing such standards the Secretary [of the Interior, later changed to the Administrator of the Environmental Protection Agency], the hearing board, or the appropriate State authority shall take into consideration their use and value for navigation." See 33 U. S. C. § 1160(c)(3) and Historical Note following 33 U. S. C. A. § 1160.

The addition of this sentence shows that Congress intended the Secretary of the Interior (later changed to the Administrator of the EPA) to have control over discharges affecting water quality but that he should protect navigation to the extent that the discharges might affect it. This sentence is totally inconsistent with the Government's contention that the Secretary of the Army has complete control of discharges of process, cooling and drainage water that are of concern because of their pollutional effect, irrespective of whether those discharges affect navigation.

B. If the Control Act and Section 13 Are Not Construed in Pari Materia, They Are Irreconcilable.

The policy behind the federal water pollution control program incorporated in the Control Act is to provide a mechanism to consider the varying and often conflicting uses of any given body of water or stretch of a river, to establish priorities for such uses, to fix specific limits on the chemical and other constituents permitted so as to protect those uses, and to force compliance with the specific standards by suits for abatement brought by the Attorney General. (33 U. S. C. §§ 1160(c) through (g)) The water quality standards and implementation plans established under the Control Act are meaningless if, regardless of how precise and stringent they may be, any United States Attorney has the power to prosecute every water user whose discharge is not identical in all respects with the receiving water.[9]

Even if it were assumed *arguendo* that Section 13 of the 1899 Act is not limited in its application to discharges directly or physically impeding navigation, it must be admitted that the central purpose of the 1899 Act was to protect the navigational interests of the United States. Certainly it is manifest that the central purpose of the Control Act was to establish a program for the control and abate-

9. As noted by the author frequently called upon by the Government in its Brief, this construction of Section 13 is a "no discharge mandate" and gives the federal prosecutor "life-and-death leverage" over every water user in the nation. Rodgers, *supra*, at page 816.

Another spokesman for such an absolute standard, which is to be "ameliorated through practical application", urges "Reliance on the prosecutor to be sensible . . ." and at the same time concedes that "It is unlikely that 'zero' discharge can ever be achieved." Sandler, *The Refuse Act of 1899: Key to Clean Water*, 58 A. B. A. J. 468, 470-471 (1972). Given this absolute interpretation it is not surprising that the Government can boast about a high conviction rate in footnote 16 on page 18 of its Brief.

ment of water pollution.[10] The conclusion must be that the central purposes of the two Acts are totally irreconcilable if the Government's interpretation of the 1899 Act as a complete or "general" prohibition is accepted.

This Court held in *The Boys Markets, Inc.* v. *Retail Clerks' Union Local 770,* 398 U. S. 235 (1970) that, where two statutes enacted at greatly disparate times appear to conflict, it becomes the task of the courts to accommodate and reconcile the older statute with the more recent one. *The Boys Markets* case involved a suit brought under Section 301 of the Labor Management Relations Act, Title 39 U. S. C. § 185(a), and the Court upheld an injunction against a strike in violation of a collective bargaining agreement containing a compulsory arbitration clause, notwithstanding the literal terms of the Norris-LaGuardia Act, Title 29 U. S. C. § 104, as well as the Court's previous decision in *Sinclair Refinery Co.* v. *Atkinson,* 370 U. S. 195 (1962). In *The Boys Markets,* 398 U. S. 235 at pages 250, 251, the Court stated:

> "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor-Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies which inspired ostensibly inconsistent provisions. See *Richards* v. *United States,* 369 U. S. 1, 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 285 (1956); *United States* v. *Hutcheson,* 312 U. S. 219, 235 (1941).
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10. The Department of Justice has tacitly conceded this. The Department's *Guidelines for Litigation Under the Refuse Act,* issued to United States Attorneys in June, 1970, in speaking of continuing discharges resulting from the ordinary operations of a plant, stated that "it is precisely this type of discharge that the Congress created the Federal Water Quality Administration to decrease or eliminate." 1 Environment Reporter, Current Developments, 288 (1970).

> "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. *Thus, it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.*" (Emphasis added.)

The Government's contention that the 1899 Act, in effect, supersedes the later Control Act rests in part upon a savings provision that has been in the Control Act since its original enactment in 1948, 33 U. S. C. § 1174. (Government's Brief, page 20) The section provides:

> "This Chapter [the Control Act] shall not be construed as (1) superseding or limiting the functions, under any other law, of the Surgeon General or of the Public Health Service, or of any other officer or agency of the United States, *relating to water pollution*, or (2) affecting or impairing the provisions of sections 407, 408, 409 and 411 to 413 of this title, or (3) affecting or impairing the provisions of any treaty of the United States." (Emphasis added.)

The separation of the section into three separate clauses, the first referring to water pollution laws, the second to provisions in the 1899 Act, and the third to treaties, is added confirmation that the Congress did not consider the 1899 Act as "relating to water pollution."

However, if this, too, is ignored the Court is confronted with a classic example for the application of the doctrine of accommodation, since there are two statutes relating to the same subject matter that contain conflicting purposes and provisions. Accommodation does not suggest a repeal of one statute by the other, but a reconciliation of both so as

to deprive neither of meaning while preserving the essential purposes of both. As applied to this case, accommodation does not involve in the slightest a diminution of the statutory purpose of Section 13 or its historic application because, until three years ago, it had never been applied in a criminal prosecution for the discharge of industrial process water.

The proper role of accommodation is described by Justice Brennan in his dissenting opinion in *Sinclair Refinery Co.* v. *Atkinson*, 370 U. S. 195, 216 (1962) (adopted by the Court as the correct statement of the law in *The Boys Markets* and overruling the *Sinclair Refinery Co.* case) where he stated:

> "Of course § 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' § 4 of the Norris-LaGuardia Act. But the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. *Our duty therefore, is to give the fullest possible effect to the central purposes of both.*" (Emphasis added.)

Reliance by the Court of Appeals in *PICCO* upon § 1174 of the Control Act as a basis for declining to define "refuse" in terms of water quality standards established under that Act suggests a misunderstanding of both the history and language of § 1174, for the reasons stated above. While the court refused, erroneously we submit, to adopt the defendant's version of accommodation, it did, as it must, recognize that in neither *Republic Steel* nor *Standard Oil* did this Court "find that Congress intended to prohibit all such discharges." 461 F. 2d 468, 473. The Court of Appeals in *PICCO* was forced to conclude at page 473:

> "There would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and section 407 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters."

Confronted with the otherwise irreconcilable statutes, the Court was compelled to rely upon the permit program contemplated by Section 13 to make the two statutes compatible. The crucial factor was the rejection of the unfounded notion that Section 13 provides an absolute prohibition against any industrial discharge—the so-called "no discharge mandate" as it is described by one of the Government's authorities. Rodgers, *supra*, at page 816.

In sum, *PICCO* stands for the proposition that Section 13 and the Control Act must be accommodated and that Congress contemplated a regulatory program supported by a viable permit system under Section 13—because the only alternative would be to find that virtually all of the nation's water users are misdemeanants operating only because the Department of Justice has not yet chosen to prosecute them.

Amicus submits that applying the 1899 Act to those discharges affecting navigation which have traditionally been regulated under that Act, and treating the Control Act as governing process, cooling and drainage water discharges which affect water quality is the only way, in the words of Justice Brennan in *Sinclair Refinery Co., supra*, "to give the fullest possible effect to the central purposes of both."[11]

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11. The Temporary Emergency Court of Appeals recently reconciled an apparent conflict between the Norris-LaGuardia Act (29 U. S. C. § 101, *et seq.*) and the Economic Stabilization Act of 1970 (12 U. S. C. § 1904 (note)) by holding that the prohibition against the granting of injunctions contained in Norris-LaGuardia must give way to the recently enacted Economic Stabilization Act. *McGuire Shaft and Tunnel Corp.* v. *Local Union No. 1791, United Mine Workers of America*, ... F. 2d ....., 20 WH Cases 1147 (T. E. C. A. Feb. 1, 1973). The Court stated:

> "In light of the importance of the Economic Stabilization Program to economic welfare of the United States, the Norris-LaGuardia Act must be interpreted to accommodate the overriding Congressional intent expressed in the Economic Stabilization Act. Such accommodations have been made in the past when the provisions of the Norris-LaGuardia Act conflicted with other specific intentions of Congress."

C. Adoption of Point I of the Government's Brief Would Emasculate the Control Act, as Amended by Congress in 1972.

Amicus recognizes that the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter "the 1972 Amendments"), do not apply to the industrial discharges challenged in this case. However, the Court's decision may have a profound effect upon the effectiveness of the comprehensive national program so painstakenly devised by Congress in the 1972 Amendments.

Running throughout the Government's Brief is the theme of dissatisfaction with the Control Act, supported by frequent references to several writers who have expressed their impatience with the Congress in failing to enact legislation to deal with the complex problems of environmental controls for contemporary society in the fashion deemed advisable by the writers. Indeed, the distorted interpretation of the 1899 Act pressed upon the Court appears to spring from this dissatisfaction or disagreement with the Congress. That is the reason, we are told, why the Department of Justice has turned to the 1899 Act as the "only effective legislative bulwark" against "industrial assault." Government Brief, p. 15.

The federal law of water pollution control was completely rewritten in the 1972 Amendments, establishing one of the most detailed and comprehensive enactments ever adopted by the Congress. In addition to providing for extensive research programs and sharply increased federal grants for construction of treatment facilities, the 1972 Amendments create the framework for a program regulating all discharges into waterways by establishing specific effluent limitations to be developed under the aegis of the Environmental Protection Agency by means of a national system of discharge permits.

An examination of the pertinent provisions of the 1972 Amendments demonstrates that the relationship between Section 13 of the 1899 Act and the Control Act, as revised, is consistent with the interpretation of Section 13 urged here by *amicus,* Chamber of Commerce. The 1972 Amendments reconcile the 1899 Act with the program designed to maintain the integrity of the nation's waters under the Control Act so as to preserve the central purposes of both laws.

In Section 502 of the 1972 Amendments "point source" is defined to include any discernible and discrete conveyance by a pipe, ditch or other conduit from which pollutants may be discharged (§ 502(14)), and "pollution" is defined as "man-induced alteration of the chemical, physical, biological, and radiological integrity of water." (§ 502(19))

Section 301 provides that effluent limitations must be established for point sources, and discharges not complying with those limitations shall be unlawful and subject to severe civil and criminal sanctions.

Section 402 establishes a National Pollutant Discharge Elimination System, to be implemented through a permit-granting program to be set up by the Administrator of the Environmental Protection Agency under guidelines provided in Section 402(a).

Without recognizing any validity in the Refuse Act Permit Program, established in December, 1970 by Executive Order 11574 (35 F. R. 19627) without any Congressional authorization whatever, but seeking to utilize data collected and work done by the Environmental Protection Agency in attempting to implement that Program, Section 402(a)(4) validates the Section 13 permits already issued.[12]

12. About 23,000 applications were submitted by water users pursuant to Executive Order 11574 (3 Environment Reporter, Current Developments, 795), but only 21 permits were issued. It is worth noting that those administering the Permit Program did not limit it to industrial discharges. Permits were issued to discharge backwash water from swimming pools at the Air Force Academy

However, in Section 402(a)(5) Congress expressly prohibits the issuance of any permits under the purported authority of Section 13 after the date of enactment of the 1972 Amendments.

Section 402(k) provides, *inter alia,* that, until December 31, 1974, where pending permit applications have not been acted upon, discharges shall not be a violation of the standards to be established under Sections 301 and 402, or a violation of Section 13. This is not an affirmation of the validity of the Refuse Act Permit Program or the attempted use of Section 13 as a pollution control measure. It simply defers prosecutions under the Control Act for a specified period of time to allow the immense administrative machinery to be set up and permit applications to be processed.

In the first section of the 1972 Amendments Congress has expressly vested in the Administrator of the Environmental Protection Agency the complete authority and responsibility for administration of the enormously far reaching water control program only a part of which is touched upon above. (§ 101(d)) The Secretary of the Army's historical role is retained in Sections 404 and 511.

Section 404 provides that the Secretary of the Army may continue to issue permits for discharges of dredged or fill material at specified disposal sites, and Section 511 preserves the authority of the Secretary of the Army to maintain navigation, making it clear by reference to Section 404 that the Secretary's permit authority relates to enforcement of the prohibition on obstructions to navigation under Section 10 of the 1899 Act (33 U. S. C. § 403).

If Section 13 provides a "no discharge mandate," unless a permit is first obtained, which is the first and principal

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in Colorado and a Boy Scouts of America facility in Oklahoma. Another permit went to a medical foundation in New Orleans to discharge cooling water from air conditioners. (2 Environment Reporter, Current Developments, 1487)

argument advanced in the Government's Brief, and permits under Section 13 cannot be granted by the Secretary of the Army, the advocates of the absolute prohibition interpretation of the 19th century act will have frustrated the Congressional program incorporated in the 1972 Amendments. The obvious and only commonsense conclusion is that in § 402(a)(5) Congress has once again manifested its view that the 1899 Act is not intended to be a water pollution control measure and does not apply to discharges of process, cooling and drainage water that are clearly regulated under the 1972 Control Act.

III.

IF SECTION 13 AND THE CONTROL ACT ARE NOT ACCOMODATED, THEIR APPLICATION VIOLATES THE DUE PROCESS CLAUSE.

If Section 13 is not construed in *pari materia* with the Control Act, then the former constitutes a regulatory scheme so vague and arbitrary as to be unconstitutional for the reasons set forth in the third section of the decision of the Third Circuit in *PICCO*.

As viewed by the Government, Section 13 provides an absolute prohibition of all discharges made without a permit. On the other hand, discharges meeting standards permitting specified levels of constituents are permitted under the Control Act. The fault is not that of Congress in enacting the statutes but that of those who assert that they should be applied so as to produce this absurd result.

At page 27 of its Brief the Government appears to contend that the Secretary of the Army is vested with this untrammeled discretion,[13] saying that "Congress has pre-

13. This theory of absolute power in the Secretary was adopted by the trial court in *PICCO*. In his charge to the jury, the trial judge said that "if the Secretary of the Army in his discretion, decided not to give anybody a permit, *so be it*." (Emphasis added) (Appendix, p. 211.)

scribed stricter controls over all discharges of refuse that may, in the Secretary's discretion, be excused from the 1899 proscription, so that foreign effluents having an *impermissibly* high waste content will no longer be deposited into our nation's navigable waters." (Emphasis added.) What does "impermissibly" mean? What standards are to be applied for the guidance of both the regulating authority and those being regulated in determining this permissibility?

It must be remembered that Section 13 is a criminal statute. As stated by the Court in *Jordan* v. *DeGeorge*, 341 U. S. 223, 230 (1951), in upholding the immigration statute requiring deportation for crimes of moral turpitude, "This Court has repeatedly stated that criminal statutes which fail to give notice that an act has been made criminal before it is done are unconstitutional deprivations of due process." *Baggett* v. *Bullitt*, 377 U. S. 360, 366-67 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961).

If the 1899 Act is treated as a prohibition of all discharges of industrial process and cooling water without a permit when none was available, without reference to their effect on navigation or any other public interest, it is arbitrary, capricious and unconstitutional as applied. While the decisions in *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934) and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) rejected the earlier substantive due process arguments on which much social legislation was struck down, they recognized the fundamental doctrine urged here. The Court stated in *Nebbia:*

> "And the guaranty of due process, as has often been held, demands only that *the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.*" (Emphasis added.)

It would make a mockery out of this simple but fundamental right if we were to accept the thesis of an Assistant

United States Attorney, Chief of the Environmental Protection Unit in one of the federal districts, who advocates "Reliance on the prosecutor to be sensible." Sandler, *supra* at footnote 9. Hundreds of commercial and industrial enterprises, in cooperation with the Environmental Protection Agency which is charged with administration of the massive program mandated under the 1972 Amendments, are devising even more comprehensive and stringent discharge standards than were provided under the prior terms of the Control Act. Must all those who in good faith and at enormous cost construct treatment facilities meeting the effluent standards still operate only at the sufferance of the federal prosecutors throughout the country!

Last year this Court struck down a vagrancy law for the reasons, *inter alia,* that it encouraged "arbitrary and erratic arrests and convictions and placed almost unfettered discretion in the hands of the police. *Papachristou* v. *City of Jacksonville,* 92 S. Ct. 839 (1972). In *Papachristou,* the Court cited with approval the previous decision in *United States* v. *Reese,* 92 U. S. 214 (1875), in which two inspectors of a municipal election were indicted for violation of a penal statute regulating elections. The Court noted in *Reese:*

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power." 92 U. S. 214, 221.

Further, the Court in *Papachristou* quoted with approval the observations of President Roosevelt in vetoing a penal vagrancy law for the District of Columbia:

" 'It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms.' H. Doc. 392, 77th Cong., 1st Sess." 92 S. Ct. 839 at 846, n. 10.

Amicus submits that the same considerations of due process and protection against "arbitrary and erratic arrests and convictions" that apply to those charged with vagrancy should also apply to the countless thousands of citizens from whose premises water is discharged into the nation's streams and lakes.

CONCLUSION.

The question confronting the Court in this appeal is not that of whether Congress has provided a water pollution control program satisfactory to the executive branch of government. The real question here is whether a 19th century criminal statute relating to navigation can be transformed into an absolute ban on discharges into our waterways by usurpation of the legislative function, to be ameliorated solely, if at all, by the exercise of prosecutorial discretion.

The fundamental issue underlying this controversy was stated with great clarity by Mr. John R. Quarles, Jr., General Counsel of the Environmental Protection Agency, in addressing an American Bar Association National Institute a few days after Congress adopted, over Presidential veto, the Federal Water Pollution Control Act Amendments of 1972. Mr. Quarles hailed the new law and concluded by saying:

"Governmental regulation is necessary in certain areas of the life of our society. Pollution control is one. When regulation is required, it should be effective within its legal framework. This has not been true with regard to water pollution. Soon it will be. *All of us in this field should look forward with gratification and relief to the establishment—at long last—of an effective Rule of Law.*" (Emphasis added.) 3 Environment Reporter, Current Developments, 793 at 795.

For the reasons set forth in this brief, the Chamber of Commerce of the United States of America urges the Court to hold that the respondent's discharges challenged in this appeal and all similar discharges of process, cooling and drainage water are subject to regulation under the Control Act and not the 1899 Act.

Respectfully submitted,

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